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No. 02-544

In the Supreme Court of the United States

JIM HODGES, GOVERNOR OF SOUTH CAROLINA,
PETITIONER

v.

SPENCER ABRAHAM, SECRETARY OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Department of Energy acted arbitrarily or capriciously, in violation of the Administrative Procedure Act, 5 U.S.C. 706, when it determined to store weapons-grade plutonium at a facility in South Carolina without first adopting a plan to process that plutonium for disposal.

2. Whether the environmental review that preceded the Department of Energy's decision satisfied the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 300 F.3d 432. The opinion of the district court (Pet. App. 32-89) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2002. The petition for a writ of certiorari was filed on October 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Energy (DOE) is responsible for monitoring, storing, and disposing of weapons-grade

plutonium and other nuclear materials in the United States. Pet. App. 7. To fulfill the Nation's ongoing weapons requirements and international non-proliferation commitments, DOE investigated over the last decade three complementary strategies for handling existing stockpiles of weapons-grade plutonium: (1) consolidation and long-term storage of *non-surplus* weapons-grade plutonium for up to 50 years at designated facilities, under standards established by the National Academy of Sciences; (2) long-term storage, under the National Academy of Sciences standards, of *surplus* weapons-grade plutonium at designated DOE facilities including the Savannah River Site near Aiken, South Carolina, pending possible disposition of that material; and (3) disposition of surplus weapons-grade plutonium into non-weapons-grade material. Gov't C.A. App. 22, 161.

The technologies that DOE investigated for disposing of surplus weapons-grade plutonium included immobilizing and storing the plutonium in glass or ceramic forms (immobilization), and burning the plutonium as mixed oxide (MOX) fuel in existing nuclear reactors. Gov't C.A. App. 28-29. As DOE proceeded, however, the agency made clear that it would not necessarily or irrevocably adopt either of those technologies. Instead, DOE determined that "disposition of [surplus weapons-grade plutonium] using these technological approaches would depend on the results of future technology development and demonstrations, site-specific environmental analyses, and detailed cost proposals as well as nonproliferation considerations." *Id.* at 28; see *id.* at 168-169, 211, 215-221, 286.

To support its investigation, DOE developed extensive documentation under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

NEPA generally requires that when a federal agency proposes a "major Federal action[] significantly affecting the quality of the human environment," the agency must prepare an environmental impact statement (EIS) explaining the environmental impacts of the proposed action and evaluating alternatives. 42 U.S.C. 4332(2)(C). NEPA also requires agencies to consider alternative means of accomplishing the same goal. 42 U.S.C. 4332(2)(E). DOE's agency-specific regulations implementing NEPA's requirements direct that when new issues arise and it is unclear whether they require the preparation of a supplemental EIS, a "Supplement Analysis" must be performed. 10 C.F.R. 1021.314(c). The Supplement Analysis may be the basis for an agency determination that an existing EIS should be supplemented, a new EIS should be prepared, or no further NEPA documentation is required. See 10 C.F.R. 1021.314(c)(2).

In December 1996, DOE issued a multi-volume programmatic EIS that addressed alternatives for storing and disposing of various nuclear materials at sites throughout the United States. Among other options, DOE examined the environmental impacts of consolidating and storing 50 metric tons of surplus weapons-grade plutonium at two designated sites: Plutonium pits (a nuclear weapon component) would be stored at the Pantex Plant in Texas, while non-pit plutonium would be stored at the Savannah River Site. Pet. App. 12-13; see Gov't C.A. App. 77-158. DOE stated in the Record of Decision for that programmatic EIS that only surplus non-pit plutonium from the Rocky Flats Environmental Technology Site in Colorado (Rocky Flats) would be consolidated at the Savannah River Site, and that this action would not occur unless DOE selected

the Savannah River Site for disposition of plutonium by immobilization. See Gov't C.A. App. 171-172.

In July 1998, DOE released a Supplement Analysis assessing a modified plan that called for earlier consolidation and storage of weapons-grade plutonium at the Savannah River Site. The 1998 Supplement Analysis determined that any new or different environmental impacts occasioned by this new proposal were not substantial or significant enough to require the preparation of a new EIS. Gov't C.A. App. 176-202; see Pet. App. 13-14.

After issuing another EIS in November 1999, DOE issued in January 2000 a Record of Decision in which it determined to pursue a hybrid strategy for disposition of surplus weapons-grade plutonium, involving both immobilization and the MOX method. Under the January 2000 decision, both immobilization facilities and MOX-production facilities would be built at the Savannah River Site. See Pet. App. 14-15.

In February 2002, DOE issued a further Supplement Analysis. The conclusion reached in that document was that the environmental impacts of long-term storage of surplus weapons-grade plutonium in an existing building at the Savannah River Site (the K-Area Materials Storage Facility (KAMS))—instead of in an entirely new facility at the Savannah River Site, as was contemplated in the 1996 programmatic EIS and the 1998 Supplement Analysis—would not require the preparation of a new EIS. Pet. App. 15.

In April 2002, DOE adopted the Record of Decision that triggered this litigation. DOE canceled the immobilization portion of the Savannah River Site disposition program and indicated that it would undertake further study of the MOX option. Pet. App. 16. DOE also decided to begin long-term storage of plutonium

from Rocky Flats at the Savannah River Site, as had been considered in the 1996 programmatic EIS. *Ibid.* DOE explained:

> [T]he schedule for site closure and cleanup [of Rocky Flats] is governed by an agreement between DOE and state regulators. Shipments from [Rocky Flats] must begin soon in order to maintain that schedule. While the material is being safely and securely stored at all locations, consolidated storage of this material as [Rocky Flats] is moving toward closure would afford DOE the opportunity to further improve the security of the material and at the same time achieve cost savings.

Gov't C.A. App. 333.

2. Petitioner, the Governor of South Carolina, brought this action against the Secretary of Energy and DOE in the United States District Court for the District of South Carolina, pursuant to NEPA and the Administrative Procedure Act (APA), 5 U.S.C. 706. Petitioner sought to have the federal respondents enjoined from "sending any surplus plutonium from Rocky Flats or anywhere else to [the Savannah River Site] unless and until DOE complies with applicable law." Pet'r C.A. App. 35. Petitioner focused particularly on the claim that DOE had not adequately studied the environmental effects of long-term storage of weapons-grade plutonium at the Savannah River Site, and argued that additional NEPA documentation should have accompanied the agency's April 2002 decision. See Pet. App. 36-37.

The district court entered summary judgment for the Secretary and DOE and denied petitioner's request for a preliminary injunction against shipping plutonium to the Savannah River Site. When granting the govern-

ment's motion for summary judgment, the district court determined that "the fifty-year impacts of storage [of weapons-grade plutonium] in general, and storage at KAMS, in particular, were examined" in the 1996 programmatic EIS and 1998 Supplement Analysis (which examined storage at another facility at the Savannah River Site) and the 2002 Supplement Analysis (which examined storage at KAMS). Pet. App. 64. The court also noted that "in both the 1996 EIS and the 1999 EIS, DOE determined that its storage strategy was not irrevocably dependent on the selection of a particular disposition strategy at any specific time." *Ibid.* The court concluded that "DOE has adequately considered and disclosed the environmental impact of its actions" and that DOE's decision to proceed with storage at the Savannah River Site "is not arbitrary or capricious." *Id.* at 65.

3. On appeal, petitioner argued primarily that DOE's April 2002 decision required additional environmental analysis under NEPA. Petitioner also argued that DOE's decision was arbitrary and capricious, in violation of the APA, because it was "erratic" (Pet'r C.A. Br. 40) for DOE not to implement certain settlement terms it had proposed earlier (under which storage of surplus plutonium at the Savannah River Site would be tied to MOX disposition at that site), notwithstanding that petitioner had rejected those terms when they were proposed (see Pet. 10-12).

The court of appeals affirmed the district court's rejection of petitioner's NEPA and APA challenges. After determining that petitioner has standing to raise his claims (Pet. App. 18-22),[1] the court of appeals

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[1] Although the court of appeals recognized "that a *parens patriae* action cannot be maintained against the Federal Govern-

agreed with the district court that DOE's earlier analyses did address the environmental risks of storing weapons-grade plutonium in the KAMS facility for up to 50 years (*id.* at 26-28). The court of appeals also rejected petitioner's argument that additional NEPA analysis was required because the April 2002 decision marked the "decoupling of plutonium storage from plutonium disposition." *Id.* at 29. The court explained that in the February 2002 Supplement Analysis, DOE had "examin[ed] its previous NEPA documents, and it concluded that its decision to decouple the storage of surplus plutonium from the disposition clearly did not create any significant environmental impacts." *Id.* at 30. The court determined that before DOE issued the April 2002 decision, it took the "hard look" that NEPA requires. *Ibid.*

The court of appeals separately addressed petitioner's APA argument, explaining that the relevant question was whether DOE's April 2002 decision "is supported by 'substantial evidence' and is not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Pet. App. 30 n.17 (quoting 5 U.S.C. 706(2)(A) and (E)). Addressing that issue, the court determined that "[i]n view of the DOE's compliance with NEPA, the Governor's APA challenge is also without merit." *Id.* at 30-31 n.17.

4. On December 2, 2002, the President signed into law the Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458. Section 3181 of the new statute sets forth a

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ment" (Pet. App. 20), it determined that petitioner has standing to challenge the April 2002 decision because, as the Governor of South Carolina, he has concrete "proprietary interests in the land, streams, and drinking water of South Carolina." *Id.* 22.

congressional finding that a "MOX facility will * * * be economically beneficial to the State of South Carolina, and that economic benefit will not be fully realized unless the MOX facility is built." Pub. L. No. 107-314, Div. C, Tit. XXXI, subtit. E, § 3181(5), 116 Stat. 2470. Congress also recognized the State of South Carolina's interest "that all defense plutonium or defense plutonium materials transferred to the Savannah River Site either be processed or be removed expeditiously." § 3181(6), 116 Stat. 2470.

Section 3182 of the new law requires the Secretary of Energy to submit to Congress a plan for the construction and operation of a MOX facility at the Savannah River Site. § 3182(a)(1), 116 Stat. 2470. Section 3182 also addresses adherence to DOE's MOX-disposition schedule (§ 3182(a) and (b), 116 Stat. 2470) and removal of MOX fuel that is produced at the Savannah River Site (§ 3182(f), 116 Stat. 2470). Section 3182 further requires removal of stored plutonium from the Savannah River Site and payments to the State of South Carolina if MOX-production targets are not achieved by specified deadlines (§ 3182(c) and (d), 116 Stat. 2470).

ARGUMENT

The court of appeals' decision on the merits is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, Congress's recent enactment of the National Defense Authorization Act for Fiscal Year 2003 specifically addresses the processing and disposition of plutonium at the Savannah River Site. Further review is not warranted.

1. Petitioner's principal argument is that the Fourth Circuit held "that compliance with NEPA implies compliance with the APA" (Pet. 17), which petitioner as-

serts (Pet. 17-21) is inconsistent with decisions of this Court and other courts of appeals.

a. Petitioner is mistaken about the court of appeals' holding in this case. Contrary to petitioner's claim (Pet. 17), the court of appeals did not hold, or even suggest, that NEPA "repeal[s] the APA." Nor did the court of appeals, having rejected petitioner's NEPA arguments, "refus[e] to go on to consider whether the Department of Energy had violated the APA." Pet. 19. To the contrary, the court of appeals clearly stated that it was undertaking review under 5 U.S.C. 706(2) in order to address petitioner's APA claim. Pet. App. 30 n.17. The court of appeals held, however, that DOE's compliance with NEPA rendered petitioner's APA challenge "also without merit." *Id.* at 30-31 n.17.

b. The court of appeals was correct that the failure of petitioner's NEPA claim doomed petitioner's APA claim as well. The point is not that NEPA "repeal[s] the APA" (Pet. 17), but that petitioner has failed to identify any statutory or constitutional rule, or any principle of administrative decision-making, that is enforceable through the APA and, on the facts of this case, imposes a greater constraint on DOE's discretion than NEPA. The Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.*, confers on the Secretary of Energy broad discretion to manage nuclear materials. See 42 U.S.C. 2013, 2121, 5814, 7151. Furthermore, DOE's compliance with NEPA entailed an in-depth evaluation of issues concerning the storage of plutonium at the Savannah River Site, and the court of appeals concluded that DOE took a "hard look" (Pet. App. 30) at those issues and its assessment of them was not arbitrary or capricious. See *id.* at 24-30. In this case, because the APA did not impose any relevant limitation on the exercise of the Secretary's discretion

that was not already imposed by NEPA, DOE's compliance with NEPA (see pp. 12-14, *infra)* dictated affirmance of the district court's decision on the merits.[2]

The gravamen of petitioner's APA challenge in the Fourth Circuit was that DOE "broke [a] commitment to process surplus plutonium" at the Savannah River Site, "rather than simply store it." Pet'r C.A. Br. 40. In this Court, petitioner likewise maintains that DOE determined to commence storage of surplus weapons-grade plutonium without a firm plan for disposition of the plutonium "[b]ecause [petitioner] would not sign" a proposed agreement under which DOE would have committed to remove plutonium from the Savannah River Site if disposition of the material did not timely proceed. Pet. 22; see Pet. 10-11.

As petitioner's argument makes clear, he is attempting through the APA to enforce proposed settlement terms on which he and DOE *did not* agree. Because the unconsummated settlement proposal does not bind DOE, it was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A), for DOE to choose another approach after petitioner rejected DOE's effort to avoid this litigation. Cf. *Hampton Tree Farms, Inc.* v. *Yeutter*, 956 F.2d 869, 872 (9th Cir.) (not arbitrary or capricious for agency to proceed with non-settling parties on different terms than with settling parties), cert. denied, 506 U.S. 816 (1992).

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[2] As petitioner notes, the government argued in the court of appeals that petitioner "had 'no independent APA cause of action *in this case*' and that '[t]he APA *here* is simply the means for effectuating judicial review under the NEPA statute.'" Pet. 15 (emphasis added). Petitioner is incorrect when he claims that the government made a general contention "that compliance with NEPA excuses compliance with the APA." *Ibid.*

Petitioner's citation (Pet. 20) to the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012, does not bolster his APA argument. Section 3155(a) of that Act required DOE to consult with South Carolina before commencing plutonium shipments to the Savannah River Site (see 115 Stat. 1378), but petitioner's complaint and his statement of the case make clear that the required consultation did occur. See Pet'r C.A. App. 29 (acknowledgment in complaint that petitioner and Secretary of Energy "have consulted" under 2002 Act); Pet. 10-12. Section 3155(c) through (f) of the Act required DOE to prepare a plan for disposition of plutonium at the Savannah River Site, 115 Stat. 1378, but did not give the Governor of South Carolina any special role in the planning process. Furthermore, petitioner did not allege a violation of the 2002 Act's planning requirement in his complaint (see Pet'r C.A. App. 13-36), and he did not rely on the Act in the court of appeals. For all those reasons, the 2002 Act fails to support petitioner's argument that DOE acted arbitrarily and capriciously when it offered petitioner concessions as part of a settlement proposal, but chose not to implement those concessions when the settlement proposal was rejected. See Pet. 4, 20.

In any event, petitioner's objections based on past consultations between DOE and the State concerning the future disposition of plutonium at the Savannah River Site have now been superseded by the provisions of the National Defense Authorization Act for Fiscal Year 2003, which specifically address the disposition of plutonium stored at the Site. See pp. 7-8, *supra*.

Petitioner's invocation of federalism principles (Pet. 21-23) likewise does not add substance to his APA argument. As the court of appeals noted and petitioner does

not dispute, "the responsibility for monitoring, storing, and disposing of nuclear materials, including plutonium, necessarily rests with the federal Government, specifically the DOE." Pet. App. 7. The weapons-grade plutonium in this case is owned by the federal government and shipped to the Savannah River Site in interstate commerce, and its storage on the federal property of the Savannah River Site, pursuant to the Secretary of Energy's powers under the Atomic Energy Act, directly implicates the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, as well as federal foreign-affairs and national-security powers. Thus, even if petitioner had clearly linked his federalism argument to the specifics of his APA challenge, which he has not done, there is no plausible violation of constitutional federalism principles in this case.

2. Petitioner also objects to the court of appeals' disposition of his NEPA claim, arguing (Pet. 24) that when DOE modified its policy regarding disposition of plutonium stored at the Savannah River Site, the agency necessarily was required to "prepar[e] new reports" addressing the environmental consequences of long-term plutonium storage.

Marsh v. *Oregon Natural Resources Council*, 490 U.S. 360 (1989), which petitioner cites as authority for that claim (see Pet. 24), in no way supports it. *Marsh* explains that an agency subject to NEPA must prepare a supplemental EIS "[i]f there remains 'major Federal action' to occur, and if the new information is sufficient to show that the remaining action will 'affect the quality of the human environment' in a significant manner or to a significant extent *not already considered*." 490 U.S. at 374 (emphasis added) (brackets omitted) (quoting 42 U.S.C. 4332(2)(C)). The court of appeals, affirming the district court, determined in this case that the long-

term storage option DOE selected in April 2002 was specifically and adequately studied in DOE's earlier environmental analyses (see Pet. App. 26-30, 57-65), thus satisfying NEPA's requirements as summarized in *Marsh*.

Petitioner faults the court of appeals' fact-intensive holding on three grounds. See Pet. 25-27. First, petitioner asserts that whereas DOE's NEPA studies assessed the environmental consequences of storing plutonium for as long as 50 years, plutonium might be stored at the Savannah River Site "until kingdom come." Pet. 25. As petitioner suggests, the court of appeals specifically agreed with the district court that DOE examined only "the fifty-year impacts of storage in general, and storage at KAMS, in particular." Pet. App. 28 (quoting district court). Petitioner's argument that DOE has not conducted NEPA review of storage beyond 50 years will become relevant if and when DOE (or its successor) addresses storage beyond the 50-year study period. The argument is not relevant now.

Petitioner next accuses DOE of violating NEPA by deciding on long-term storage first, and "then analyz-[ing] its environmental consequences later." Pet. 26. The sequence of events determined by the district court and the court of appeals, however, is that DOE: (1) set forth options for addressing the weapons-grade plutonium problem, including both a preferred alternative for storage with disposition and the stand-alone storage option that ultimately was selected; (2) studied all of the options; and (3) after initially selecting the storage-with-disposition option, later adopted the stand-alone storage option that it had studied from the outset of the program. See Pet. App. 26-30, 62-64. Consistent with NEPA, environmental review of the storage option selected in April 2002 *preceded* DOE's decision.

Finally, petitioner cites letters to DOE from the independent Defense Nuclear Facilities Safety Board, in which that Board indicated that the KAMS facility was designed to provide only interim storage of plutonium. See Pet. 26-27. The district court addressed that argument as well, concluding that DOE had considered "specific concerns which had been raised by the Defense Nuclear Facilities Safety Board." Pet. App. 54; see Gov't C.A. App. 326-327 (February 2002 Supplement Analysis, discussing results of investigation conducted by DOE and DOE contractor to investigate issues raised by Board). Furthermore, in the National Defense Authorization Act for Fiscal Year 2003, Congress has directed further study of the suitability of the KAMS facility for long-term storage of weapons-grade plutonium. See § 3183(a), 116 Stat. 2470.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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